

- (1) Did the relationship of employer/employee exist on the date of accident between claimant and John Walker and/or J & H Trucking, Inc., or was claimant an independent contractor?
- (2) Do the provisions of K.S.A. 1997 Supp. 44-503(h) apply, and is claimant an owner/operator and exclusive driver of a motor vehicle leased to a licensed motor carrier?
- (3) Is respondent entitled to a credit for all benefits paid under the occupational health insurance policy procured on behalf of Mr. Stansbury, as a credit against the compensation, which was ordered paid as temporary total disability compensation? Respondent acknowledges that, while this issue was raised before the Administrative Law Judge, no decision was made by

the Administrative Law Judge, and requests this issue be remanded back to the Administrative Law Judge for a decision.

Claimant raises the following issue in its brief to the Board:

Was the appeal by respondent timely from the December 11, 1998, Order of the Administrative Law Judge?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board will first consider whether this appeal was timely filed under K.S.A. 1997 Supp. 44-551(b)(1), which states in part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation.

Claimant argues respondent's appeal from this December 11, 1998, decision was due on December 21, 1998, and therefore the appeal, which was received on December 24, 1998, is untimely. In considering the specific language of K.S.A. 1997 Supp. 44-551, the 10-day period raised by claimant is not a calendar day count, but rather a business day count. Therefore, excluding Saturdays, Sundays and legal holidays, the appeal time for a December 11, 1998, decision would, at the earliest, be December 29, 1998. Therefore, respondent's appeal is timely.

Claimant's employer/employee relationship with respondent and an injury, suffered while this relationship existed, involve the issue of whether claimant suffered accidental injury arising out of and in the course of his employment. Therefore, this appeal is subject to review by the Appeals Board upon application from a preliminary hearing.

Whether claimant is an employee of respondent or an independent contractor is controlled by K.S.A. 1997 Supp. 44-503(h) which states in part:

(1) For purposes of this section, any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor within the

meaning of this section or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal within the meaning of this section or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto, if the owner-operator is covered by an occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act

Respondent argues claimant is an owner-operator and the exclusive driver of a motor vehicle leased to respondent pursuant to the terms of an agreement entered on March 4, 1998, between John Walker, owner/lessor, and Kenneth L. Stansbury, claimant/contract operator. In that lease agreement, claimant is granted a 1 percent ownership in the equipment he operates. In addition, if after three years claimant is still leased to Walker Trucking, then claimant will be paid 1 percent of the fair market truck value of the vehicle that he is operating at that time.

This contract is intended to invoke the provisions of K.S.A. 1997 Supp. 44-503(h) in order to avoid the responsibility of providing workers' compensation insurance to claimant. However, K.S.A. 1997 Supp. 44-503(h)(2)(C) defines owner-operator as "an individual who is the owner of a single motor vehicle that is driven exclusively by the owner under a lease agreement or contract with a licensed motor carrier."

The Appeals Board, in considering the language of K.S.A. 1997 Supp. 44-503(h)(2)(C), cannot find that claimant is the owner of a single motor vehicle, having only a questionable 1 percent ownership interest in that vehicle, with the other 99 percent remaining with respondent. The Appeals Board finds that this contract does not bring claimant under K.S.A. 1997 Supp. 44-503, and, as claimant is found to be an employee of respondent, he is entitled to workers' compensation benefits.

Respondent also raises the issue regarding any credit which would be due for benefits paid under the occupational health policy. This issue is not a jurisdictional issue under K.S.A. 1997 Supp. 44-551 or listed in K.S.A. 1997 Supp. 44-534a, and does not grant the Appeals Board jurisdiction from a preliminary hearing. This matter may be raised at the time of regular hearing for consideration.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated December 11, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
Kendall R. Cunningham, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director